Approved For Release 2001/09/07 : CIA-RDP75B00380R000500370002-9

OGC 73-1080

15 June 1973

STATINTL

MEMORANDUM FOR: [redacted] OLC

SUBJECT : S.1726 -- Public Information Act of 1973

Generally I would support your comments. The following will elaborate on some of the same points and make some specific comments on things that seem particularily noteworthy to me.

Page 2, Line 21

The Bill does not change 5 U.S.C. 552(b)(3), which exempts from the disclosure requirements matters specifically exempted from disclosure by statute. While section 6 of the CIA Act provides such statutory exemption, this is quite specific and thus quite limited. I would be very concerned about our ability to stretch section 102(d)(3) on the protection of intelligence sources and methods to meet the provisions of (b)(3) of the present law in the face of the broad disclosure requirements of the law as S.1726 would amend it. Section 102(d)(3) places responsibility upon the Director, but it gives him no specific authority. I think it would be very weak support in the face of a later statute as broad as this.

Page 2, Lines 25-26

This is confusing. It appears to result in exempting from the section 552 disclosure requirement anything which has been declassified (emphasis supplied) under subsection (e) of S.1726.

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Page 4, Lines 2-6

This sentence seems to be in conflict with the previous sentence which authorizes classification when unauthorized disclosure "may reasonably be expected to cause damage to the national defense". The use of the word "only" in Line 3 leaves it open to interpretation as a qualification of the authority in the previous sentence. The sentence either does nothing or seriously waters down the basic classification authority and it would be better to delete it. Alternatively, the words "tend to" could be inserted after "would" in Line 4 or, as you suggested, "could" might be used instead of "would".

Page 4, Line 13

The only classification provided for would be "Secret Defense Data". The lack of degrees of classification may be questionable. All material which would qualify for this classification would not be equally sensitive. The result could be overclassification of some material and possibly a need for handling controls for all classified material which would normally apply only to material of greatest sensitivity.

Page 5, Lines 17-18

"Section chief or its equivalent" is very vague statutory language.

Page 7, Lines 16-20

The strict limitation of classification on the basis of content might create problems, especially in this Agency. I can't come up quickly with an example, but I think it is evident that knowledge that the Agency is studying a particular group or type of unclassified material might make obvious national defense matters which in themselves are, or should be, classified. Maybe this is something we should talk about in order to come up with good examples because otherwise it will be very difficult to convince anyone who is trying to restrict classification authority.

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Page 9, Lines 1-4

The requirement that classified information or material from a foreign government be provided to any member or committee of Congress notwithstanding any contrary agreement or stipulation certainly would serve to reduce the availability of information from foreign governments to the detriment of the United States.

Pages 9-13

These specific requirements for designation, reclassification and declassification seem to be so burdensome that the system might fall of its own weight. The least burdensome is section 104(d)(9) set forth on Page 9, Line 5 et seq. Nevertheless, it would require employees using previously classified material to reconsider the material under the S.1726 requirements even though in many cases such employees might not be familiar enough with the background to make a proper decision without great difficulty. The problem with the declassification provisions is that they cannot be avoided in any practical way if Page 13, Lines 8-10 are effective. This requirement that deferrals of declassification be done only by the Agency head and not be redelegated would make the procedure nearly unusable.

Page 12, Lines 9-20

The requirement of written reports to Congressional committees of declassification deferrals and the subsequent publication of reports by the committees provides a head-on conflict with the Director's responsibility under section 102(d)(3). It is hard to believe that in a reasonable climate the conflict could not be resolved or the Director's responsibility be upheld, but if this provision were enacted, I think it would be a clear indication of a climate which might negate the Director's responsibility.

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Page 13, Line 13 et seq.

This provision for a civil action by any person contesting a deferral of automatic declassification seems designed to promote litigation and harassment including some promoted by opposition intelligence services. The subsection also places a duty on the courts which they may not want and in many cases may not be well qualified to undertake.

Page 14, Lines 15-23

This is another burdensome requirement which must be designed either to totally defeat the classification system or to create a paperwork bureaucracy. It also assumes that the declassification authority would know who all the holders of such declassified material are.

Page 15, Line 4

A possible conflict with section 6 of the CIA Act.

Page 15, Lines 16-20

This gives the Administrator of General Services authority which in most cases he would be unqualified to exercise, at least without the assistance of the classifying agency. Although the subsection provides for such assistance, it does not require the Administrator to use it, and thus in theory, he could act arbitrarily.

Page 16, Lines 6-14

This subsection appears to require regulations providing for disciplinary action for improper classification.

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Page 17, Line 19 et seq.

This subsection (F) as well as subsections (B) through (E) appear to conflict with section 102(d)(3) and possibly with section 6 of the CIA Act.

Page 19, Lines 7-15

This doesn't make much difference to the Agency and I am sure we won't want to comment on it; however, I think Article I, section 6 of the U.S. Constitution, as interpreted, says this already.

Page 23, Lines 8-20

Again, we probably won't want to comment on it, but these two subsections might present a nice constitutional question.

Page 24, Lines 19-23

I agree with your comments about conflicts with statutes protecting CIA information and I also note that this seems to overlap the duties and authorities of the Comptroller-General.

Page 27 et seq. (Title IV -- Privileged Information)

This would seem to be just another in the continuing series of legislative efforts to limit executive privilege by statute. I don't see why it should have any more or less effect than any other efforts and I am sure that executive privilege will continue, as it has for 184 years, to be a controversial issue finally settled case by case by reasonable men who will be wise enough not to take positions they cannot back away from.

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Assistant General Counsel

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